No. 84-277 (9)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—v.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DESOUSA

and

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The respondents steadfastly ignore or obfuscate the fact that Scarsdale *has never had a "forum generally open" for unattended partisan or sectarian symbols*. Building upon the resulting void, they press for an unprecedented and unprincipled right to leave a crèche in the public park over the judgment and decision of the Village's elected Board. They argue that the

Circuit should be affirmed without worrying about general principles. They say that cognate problems of demanded public park space for swastikas or other "fighting" symbols—to say nothing of "adult" statues or vulgar or partisan political signs—can be pretermitted because only a crèche is involved in this case. But it is clear that the new and interesting problems in this case cannot be resolved merely by mechanical shuffling of old categories without regard to principle.

Unlike respondents, the United States as *amicus curiae* contributes a genuine effort to grapple with the challenging problems this case presents. The Solicitor General appears to acknowledge that a free speech rule requiring a Nativity scene in the park would require widely detested or disfavored symbols as well. He recognizes too that incantation of the term "public forum" is not an adequate solution and that Scarsdale could on "neutral principles" deny a public site both for religious symbols and for vulgar or offensive or merely partisan political, ideological or sexual signs (Br. 21 *et seq.*). Beyond that point, however, the Government's position becomes (a) somewhat ambiguous in spots, suggesting a "principle" that is either obscure or identical with petitioners' position (*infra*, pp. 13-14), and, ultimately, (b) overly broad and intolerable, requiring a choice between allowing all private structures or none to stand in public parks (*infra*, pp. 14-15).[1]

Petitioners submit that none of the variable and inconsistent positions on the other side provides a sound basis for affirmance. Scarsdale's ending of the annual display of the only partisan or sectarian symbol ever emplaced in its parks left the Village with a principled, neutral, constitutional stance. The

1 Another *amicus*, the Catholic League for Religious and Civil Rights, tenders another new thought—that the decision of the Court of Appeals should be vacated insofar as it "imposes a disclaimer sign requirement" (Br. 7-8). The contention may follow from the logic of respondents' position—*i.e.*, that there is no danger of an appearance of government support for an unattended symbol standing in the public park. The respondents, however, filed no cross-petition for certiorari and make no such argument. To the contrary, both they and the Solicitor General rely upon the disclaimer sign as an adjunct favoring their several positions (McCreary Br. 28-29; Creche Comm. Br. 21, 26; U.S. Br. 14).

judgment of the Court of Appeals is justified neither by the Free Speech Clause nor on any other valid basis.

1. Scarsdale has sensibly allowed in its parks only a few nonpartisan community symbols like those of the Red Cross and the United Fund

Over and over again the respondents cite as a complete and free-standing "finding" that Scarsdale has made its parks "freely available" for the placement of unattended symbols of all kinds (Creche Comm. Br. 4, 6, 7, 12, 16, 17, 18, 21, 25; McCreary Br. 8). The Solicitor General, treating the facts with contrasting (and expected) fairness, helps to expose the misleading nature of those statements (Br. 4 & n.2, 24). At any rate, the undisputed facts of record, and the District Court's opinion, make clear that respondents' assertions are out-of-context distortions.

What the District Court found, and the record shows, is that Scarsdale's land has been used only for such totally noncontroversial symbols as those of the Red Cross, the Cancer Crusade, the Girl Scouts, the Boy Scouts and the United Fund, and never for controversial partisan or sectarian symbols other than the crèche (Pet. App. 43a-47a, 58a-59a; J.A. 58-63). Indeed, the Creche Committee, purporting to provide some *examples* of unattended symbols permitted in Scarsdale's parks, has listed the *only* seven such displays ever to have received Board approval (Br. 4). The sole controversy through the years has been over the crèche (Pet. App. 56a). Scarsdale's Board, assuming it ever had the right to make that exception, plainly had the right to eliminate it. The grounds for that conclusion, argued in our main brief, are buttressed in this reply.

2. A forum "generally open" for live speech of all kinds need not be open for the planting of partisan or sectarian symbols

The first question presented in this case is whether a forum generally open for live forms of expression, but never for partisan or sectarian symbols other than the crèche, *must be* a

forum generally open for unattended symbols.[2] Unlike the National Park Service, neither Scarsdale nor any municipality

2 The Solicitor General argues that the Court of Appeals' decision "did not compel the Village to grant permission for respondents to put on their display" (Br. 7). Explaining this, and quoting from the opinion below, the Government says the Circuit only enjoined reliance upon the Establishment Clause "as a reason for prohibiting the erection of a creche at Boniface Circle" (*id.*, quoting Pet. App. 25a). Since he says nothing is compelled except relinquishment of a reason, and though he would deem it wrong to compel room for unattended structures as "a *constitutional* rule" (*id.* at 3, emphasis in original), the Solicitor General finds this a "basis" on which he is able to "urge affirmance of the judgment below" (Br. 20).

This is an ingenious but ultimately useless analysis. The courts do not sit—nor did the Circuit sit—to give advisory opinions about "reasons." "This Court . . . reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). The Solicitor General's formulation, were it valid, could apply to denature this Court's decision in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). There, as here, the plaintiffs, invoking the Free Speech Clause, sought to use for religious expression a University public forum, and the defendants resisted on the basis of the Establishment Clause. The Eighth Circuit ruled that the University "may not" prohibit such a use. *Chess* v. *Widmar*, 635 F.2d 1310, 1312 (1980). This Court affirmed, sustaining the positive ground of plaintiffs' claim, the Free Speech Clause, and rejecting the Establishment Clause defense. In those vital respects, this case is identical in the judgment of the Court of Appeals.

The Court of Appeals made the identity plain in its square reliance upon *Widmar*. If the Solicitor General were correct in saying (Br. 19) that the entirety of the "holding" below was covered when the Court wrote (Pet. App. 24a) that it held "only that the Village would not contravene the establishment clause by allowing the display of a creche at Boniface Circle," there would have been no occasion for that Court even to mention *Widmar*. Nor would it have had to order the District Court to deal with the disclaimer sign (Pet. App. 21a-22a). Nor would it have remanded both "for action regarding a disclaimer sign . . . *and* for other such *action* as is consistent with [its] determination" (Pet. App. 25a, emphasis added). The Court of Appeals tracked *Widmar* in detail to its parallel result, ordering an injunction down to the detail of the sign, equating the student speakers with the unattended Nativity scene. Everybody thought, and thinks, the University in *Widmar* was *compelled* to allow the plaintiffs to use the public forum as they demanded. Here, similarly, both the petitioners and the respondents (*see* Creche Comm. Br. 29-30; McCreary Br. 21) proceed on the understanding that the Court of Appeals followed the lines of *Widmar* to a similar form of injunction. It is not uninteresting, moreover, to note the Solicitor General's similar view of *Widmar* in an *amicus* brief filed almost simultaneously with his brief herein. Supporting as *amicus* the petition for certiorari in *Bender* v. *Williamsport Area School District*, No. 84-773—a course he was invited but declined to take at the petition stage of the instant case—he described *Widmar* (Br. 9) as having held that the University of Missouri, having "created a limited public forum . . . *could not* close its facilities to a group wishing to engage in religious worship and discussion" (emphasis added).

In any event, meeting the first, affirmative, essential *Widmar* premise, petitioners seek to show that respondents do not have the Free Speech claim for placing their symbol in the park that plaintiffs had for their live speech in *Widmar*. If we are correct in that, there should be a reversal without reaching the Establishment Clause question. If we are wrong in that first point, but correct in our Establishment Clause claim, distinguishing *Lynch* v. *Donnelly*, that is an alternative ground for reversal. Either way, this Court's granting of the writ was appropriate and the injunction ordered by the court below is a compulsion, not the mere disagreement about a "reason" to which it is diminished in the Government's presentation.

we know of has created a forum generally open for unattended symbols and, as the Solicitor General agrees, they are not required to. Most or all municipalities answer the question presented as Scarsdale did, by creating of their parkland limited forums for signs or structures—allowing only a few unattended symbols that are generally favored by the community, nonpartisan and nonsectarian. Whatever may be true of other forms of expression, it has never been a proposition of American law or practice that the "uninhibited, robust, and wide-open" debate safeguarded by the First Amendment, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), must be extended to include powerfully sectarian and divisive symbols compulsorily installed in the public parks.

Public agencies have broad authority, where unattended signs or symbols are concerned, to decide (a) whether to create a public forum and (b) whether the forum is to be limited or unlimited. If it once creates a forum open for all speakers, the government cannot, without a compelling reason, exclude some speakers on the basis of their subjects or views. *Widmar* v. *Vincent*, 454 U.S. 263, 269-70 (1981); *Carey* v. *Brown*, 447 U.S. 455, 464-65 (1980). If it creates a forum generally open for all kinds of signs and symbols, the government may not exclude some on discriminatory, content-based grounds. *E.g.*, *Lebron* v. *Washington Metropolitan Area Transit Authority*, No. 84-5189 (D.C. Cir. Dec. 14, 1984); *Planned Parenthood*

Assn. v. *Chicago Transit Auth.*, 592 F. Supp. 544 (N.D. Ill. 1984); *Coalition for Abortion Rights* v. *Niagara Frontier Transp.*, 584 F. Supp. 985 (W.D.N.Y. 1984). But the government is empowered to make places available for some kinds of expression or communication while it enforces reasonable exclusions based upon the nature of the speech and the places and on sound judgments of fairness. *Greer* v. *Spock*, 424 U.S. 828, 838 & n.10, 839 (1976); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302-03 (1974); *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972).

The fact that some kinds of speakers are allowed does not "serve to convert [government property] into a public forum." *Greer* v. *Spock*, 424 U.S. at 838 n.10. Distinctions based on "content" (which is not a simple talisman) may create forums only partially open. The government may supply communicative facilities even for some *speakers* without opening them generally as a forum. *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 47-48 (1983). A government enclave may be opened still more widely for varieties of speakers, but excluding some whose subjects are at war with the enclave's functions. *Greer* v. *Spock*, 424 U.S. at 838 n.10, 839. By a parity of reasoning, the allowance of some symbols, cherished (or at least not opposed) by all in the community, does not require that the public land be made available for any kind of disputed symbol anyone wishes to leave there. An array of precedent and sound principle supports this conclusion.

Our adversaries distinguish cases like *Lehman*, *Greer*, *Perry* and still others on the grounds that they did not involve unlimited public forums. That is part, however, of a consistent course of question-begging. The underlying question is whether Scarsdale has ever had, or must have, a public forum for unattended structures. If that question calls for a negative answer, as we urge, the principles of the cited cases come strongly to bear. And it is worth stressing that *there is no decision other than that of the court below supporting respondents' claimed right to plant and leave their symbol in the park as an exercise of the right of free speech.*

As the respondents point out, the "government" itself puts symbols on its property reflecting community sentiments and values, but nobody has ever imagined this creates "forums generally open" for competing or opposed symbols. To take one of respondents' examples (Creche Comm. Br. 13), Richmond's prominent statues of Confederate Civil War heroes have not been thought to open that City's streets for compulsory display of statues of John Brown or Nat Turner, or even Abraham Lincoln. Contrariwise, it is not the law that the Federal Government must make room at the Lincoln Memorial area for a statue of Jefferson Davis or on the Mall for an anti-Vietnam War memorial to compete with one recently placed there. Though Spence could fly his revised American flag on private property, *Spence* v. *Washington*, 418 U.S. 405 (1974), the Government, without writing a "neutral rule" for this in advance, need not let him plant it at the Washington Monument alongside the American flags that fly there. "The majority, as represented by its elected officials, has a right to speak."[3] If the "speech" takes the form of valued symbols on public places, those places do not thereby become "public forums" for other symbols that the majority chooses not to display or have displayed.

The reminder of unattended symbols for which governments characteristically employ their own land highlights in its own way the material differences between such uses of public land and the transient presence of live speakers. These differences, which are at the heart of the case, include centrally the inescapable association, physical and perceptual, between the land and the structure left upon it. This central factor is resolutely ignored by respondents or, worse yet, treated as if it could be talked away. Like the District Court (Pet. App. 56a), the Solicitor General confronts (Br. 23) the special character of the "unattended structure" that "sits there, unmoving," and is "more likely [than a speaker] to be viewed as communicating the government's own views." Blinking the realities, which so clearly and explicitly concerned Scarsdale's Trustees and resi-

3 M. YUDOF, WHEN GOVERNMENT SPEAKS 46 (1983).

dents, much of respondents' general argumentation about "protected speech" is beside the point.[4]

In the civilized service of community sensibilities, even private land may be regulated to exclude some forms of "speech" from some areas. *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 512 (1981); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976). In this significant sense, the majority's aesthetic and moral sentiments are accommodated without censoring or suppressing the speech thus regulated. Free expression on one's private property is surely even more protected than speech or expression in the parks. *Cf. Stanley* v. *Georgia*, 394 U.S. 557 (1969); *Spence* v. *Washington*, 418 U.S. 405 (1974). The differences, whatever they signify for live speakers, make no room for judicial orders requiring a place in the park for contentious symbols the community resists without favoritism to anyone or any viewpoint.

3. Scarsdale's position imports no hostility toward religion

A constant theme of respondents' briefs is that Scarsdale's denial of a public site for the crèche was prompted by hostility or aversion to religion, and particularly to the Christian reli-

4 The District Court, observing that the unattended symbol delivers its Christian message even if respondents are far away from it and never go near it, found that for such a symbol thus sited the public land in some measure becomes "the message bearer" (Pet. App. 55a-56a). It added (Pet. App. 57a): "Indeed, cultivating an aura of Village approval is, in our view, one of the factors fueling plaintiffs' desire to have the creche on public property." The Creche Committee answers that its "intention . . . is constitutionally irrelevant" (Br. 19). The Solicitor General makes similar observations about the irrelevancy of "motives and reasons" (Br. 15 n.9). These are not weighty thoughts. The District Court's findings reflect the teachings of elementary law and common sense. It is obviously relevant, constitutionally and otherwise, especially where *appearance* is of prime importance, that a person intends effects that are said to have been achieved. *E.g.*, *Perfect Fit Industries, Inc.* v. *Acme Quilting Co.*, 618 F.2d 950, 954 (2d Cir. 1980), *cert. denied*, 459 U.S. 832 (1982); RESTATEMENT OF TORTS § 729 comment f (1938). As for the Creche Committee's hypothetical concerning the Vatican (Br. 19), which must be supposed to have been advanced seriously, it would indeed be a constitutional concern if the Vatican, unimaginably, were to offer objects to place on American public property with the purpose of using that property for proselytization in the teeth of the First Amendment.

gion. They din words like "suppression" and "censorship" of religion to characterize a Village where religious manifestations of all kinds appear everywhere and where crèches are freely displayed, but have been denied the authority of a public platform (McCreary Br. 8, 12, 19, 20, 34; Creche Comm. Br. 14, 16, 17, 18, 19, 29). It is said that the Village wants a "sanitized" or " 'Christ' free" Christmas (Creche Comm. Br. 31; McCreary Br. 11) and accomplishes "a conscious institutionalization of hostility against a religious message" (*id.*). Vividly contradicted elsewhere by respondents themselves, this is a baseless and unworthy line of argument.

The record reflects no antireligious sentiments harbored by the Trustees who voted against display of the crèche. Rather, like the four dissenting Justices in *Lynch*, the Trustees consistently showed respect, and even devotion, to the crèche and the religious message it conveys. Far from discriminating against respondents' message, former Mayor Stone, who cast the deciding votes against the crèche in 1981 and 1982, is, as the District Court mentioned, "a Christian . . . who maintains a creche in her own home" (Pet. App. 60a). Time and again throughout the annual debates Mayor Stone and Trustees on both sides of the issue recognized that opponents were not "against the display of the creche" throughout the Village, but only against "allowing a religious display on public property" (J.A. 142, 144, 149, 163, 208). The Trustees in 1981 expressed their "delight" that the crèche would be displayed on private land across from Boniface Circle (J.A. 149) and in 1982 permitted a private group to "celebrate the birth and divinity of Jesus Christ" on Boniface Circle through carols amplified by Village-owned loud speakers (Creche Comm. Br. 27-28; J.A. 52-53).

In the face of what this record actually shows about Scarsdale's hospitable treatment of all religions, certainly not excluding Christianity, respondents ascend to claims for "tolerance" (McCreary Br. 9, 32; Creche Comm. Br. 13-14), even comparing Scarsdale unfavorably with the "black citizens" and others who are said (Creche Comm. Br. 13) to accept "without notable discord" Confederate statuary in Richmond

and other cities of the South.[5] The black citizens who could not even vote when such statues were erected would find words other than "tolerance" to describe their feelings about Confederate memorials. *Cf. Augustus* v. *School Board*, 507 F.2d 152, 155, 156 (5th Cir. 1975), affirming limitations on the First Amendment right to employ symbols in a school integration context of "racial tension" resulting from "black students' demands to abolish the school's Confederate symbols." *See also* Professor Black's thoughts of a native son on the differences in the South between symbolic names like "Leeville" and "Carver" or "Lincoln High." *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 425 (1960).[6] This is

5 Seemingly without noticing the self-contradiction, respondent Creche Committee notes repeatedly (Br. 5, 19, 27-28) the extensive record evidence of the regular and wholly welcomed appearance in Scarsdale's parks of live carolers and other celebrants proclaiming "the birth and divinity of Jesus Christ." Churches of all denominations use publicly owned facilities for services and meetings (Pet. App. 4a-5a, 56a; J.A. 55-58).

6 In one respect, respondents' discussion of such government sponsored (but not universally applauded) symbols as Confederate statuary prompts us to restate and clarify some of the broader implications in our main brief. The example of Richmond is indeed a reminder that any symbol or statue emplaced or allowed by municipal authorities—whether Confederate generals or Vietnam veterans or perhaps even the Red Cross and the United Fund—is liable to evoke negative and hostile reactions in some residents. It is not to be supposed that this entails a veto power for every resident. But if the opposition rises to a sufficient level, the protests may stir difficult questions as to whether the government has exceeded its constitutional authority, violating First Amendment rights of the protesters. *Cf. Wooley* v. *Maynard*, 430 U.S. 705 (1977); *Augustus* v. *School Board*, *supra*; M. YUDOF, *supra* note 3. It may come to be held, as the citations suggest, that the public agency *may not* allow or itself erect particular controversial symbols employing shared resources. But this is 180 degrees away from the claim that the Free Speech clause *compels* a public site for such symbols because they are "speech" (admittedly) and live speakers would be entitled to deliver their messages on that site. What respondents help to clarify is that this case, dealing with the unprecedented and extraordinary rights claimed by respondents, will not answer all the questions over the horizon about permissible or required symbols in the public parks. The decision can and should, however, repel the basic thesis that the courts under the Free Speech Clause are required or permitted to supersede the judgments of elected municipal officials and order a place in the park for anybody's statue or symbol, generally loved or hated, because it is "speech."

not the most important respect, however, in which respondents' use of the word "tolerance" is fanciful.[7]

4. Scarsdale's neutral principle of access, reached through careful scrutiny of the only case presented, should be sustained

With the elimination of respondents' unfounded premise that the Village parks are, or must be, unlimited public forums for partisan structures or symbols, the constitutional power of the Board to refuse a public site for the crèche seems plain. Scarsdale's position is supported by clear lines of this Court's authority, steadily invoked by petitioners and steadfastly ignored by respondents. Neither respondents nor anyone else has any "generalized constitutional right," *Greer* v. *Spock*, 424 U.S. at 838, to "speak" through signs or other objects placed and left on public property. More particularly, the grounds supporting Scarsdale's decision are:

(1) The decision "is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. at 46; *Greer* v. *Spock*, *supra*; *Widmar* v. *Vincent*, 454 U.S. at 280, 281 (Stevens, J., concurring).

(2) The unprecedented claim of a right to override the judgments of municipal officials and leave unattended structures or symbols in the parks is wholly incompatible with the lawful, traditional, intended and

7 In addition to their Pickwickian conception of "tolerance," the McCreary respondents express incredulity that anyone could talk of "divisiveness" given the "peaceful history of the creche display in Scarsdale" (Br. 27 n.13). It bears mention in this light that through all the years when the crèche was allowed on Boniface Circle, the objections were indeed peaceful and civil, though steady and substantial. When permission for the crèche was denied, however, the ensuing "small uproar" included a significant number of objectors who "perceived the problem as one stemming from a difference between Christians and Jews" (Pet. App. 34a) and "a handful [that] . . . could be called blatantly antisemitic" (Pet. App. 35a). The then Mayor placed the number of letters with "an antisemitic tone" at "at least 100" (Pet. App. 34a).

dedicated uses of these communally owned places. *Perry, supra*, at 46, 49; *Greer, supra*.

(3) Neutral limitations upon place or medium, and even upon classes of speakers, may relate to the content of the expression provided they serve significant interests. *CSC* v. *Letter Carriers*, 413 U.S. 548, 564 (1973); *Young* v. *American Mini Theatres, Inc.*, *supra*; *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). As shown in our main brief (p. 31 *et seq.*), this standard is met here; in the service of competing interests that are themselves of First Amendment moment, Scarsdale's Board leaves respondents free to place crèches anywhere except in the public parks, and even there to deliver the religious message of the Nativity in the form of their own or others' live expressions.

The accommodation Scarsdale has reached, even if it remains "free to strike a different balance than it has," *CSC* v. *Letter Carriers*, 413 U.S. at 564, is well within the bounds of the constitutional authority reserved to those elected to govern the municipality.

Respondents proclaim, as if it were a disputed proposition, that the free speech protection is more needful for minority views than for the majority's (Creche Comm. Br. 10; McCreary Br. 32). Agreeing vigorously with that, we have stressed that the free speech "protection" extends to vulgar words, Nazi doctrine, antireligious expressions, "adult" sexual presentations and other kinds of "content" widely or generally disfavored. And we have challenged respondents in three courts to say how their claimed right to compel a place for their symbol in the park could be withheld from proponents of swastikas, "adult" statuary, or a sign saying "Religion is the opium of the people." In the two courts below, respondents coped with that difficulty by ignoring it, as did the Court of Appeals. Here, both sets of respondents touch the subject with lightning glances—with inapposite or at best trivially partial observations about "fighting words" and with empty assurances that those inseparably related subjects can be ignored

while the Court decides today only about a crèche (Creche Comm. Br. 22-23; McCreary Br. 33-34).[8]

The cursory reference to "fighting words" does not so much as graze the problem. To begin with, it is doubtful that the quoted phrase could justify denial of free speech to Nazis or other antidemocratic speakers. *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969); *Terminiello* v. *Chicago*, 337 U.S. 1 (1949). Beyond that, as recognized in the brief for the United States, the principle to be sought here must embrace all kinds of controversial expression—on sex, politics, war and peace as well as religion—that are surely not "fighting words." So the serious concerns in the case, which respondents continue simply to neglect, must cover the question of power to admit to or exclude from the park varieties of signs and symbols that many or a majority of the residents find repugnant when they are stood on the public land.

The Solicitor General, cognizant that this is owed to the Court, acknowledges, and indeed presses, a need for "neutral principles" (Br. 26-27). He finds in this, however, a ground for affirming the Court of Appeals, which did not reach the need at all, and for enjoining the Village Board, which for many years (except for permitting the crèche) had permitted in its parks on a case-by-case basis only a few nonpartisan community symbols like those of the Red Cross and United Fund. The Solicitor General's own submissions, together with canons of law and good sense governing the efforts of municipal officials to proceed fairly and neutrally, help to vindicate the position of Scarsdale's Board.

The brief for the United States is both inconsistent and obscure in its quest for neutral rules or neutral principles. At

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8 Respondents McCreary *et al.* treat the prospect of less lovable symbols as chimeras (Br. 33). Others are more aware and more realistic. In Detroit, one of the places where crèches have been a lively subject for litigation in the past year, *e.g.*, *ACLU* v. *City of Birmingham*, 588 F. Supp. 1337 (E.D. Mich. 1984), a Nazi group has already claimed "equal treatment" with the sponsors of a Nativity scene for the display at the City-County Building of Hitler's picture on the anniversary of his birthday. *See* Appendix, *infra*. Of course, the question of principle would be here even if the people who would destroy free expression were less astute to claim their undoubted right to equal treatment under the First Amendment.

one point it states that Scarsdale is empowered to follow "neutral policies . . . and thereby either to permit or to exclude nativity scenes and *similar unattended structures*" (p. 10, emphasis added). In a later, similar passage, government counsel say: "If the Village chooses to adopt neutral rules that would have the effect of excluding the creche—along with *all comparable* unattended symbols—from the park, we believe it should be allowed to do so" (p. 22, emphasis added). The Government never says, however, what structures it deems "similar" or "comparable." Scarsdale has answered this question fairly and sufficiently in the one and only case of a controversial structure ever to come before the Board. The departure from long practice in allowing the crèche has been eliminated. The neutral principle thus achieved is that no controversial or sectarian symbols have been admitted to the parks. No more than the courts or other agencies must Scarsdale announce now specific decisions about prospective applications for swastikas[9] or Democratic Party campaign signs or myriad other things for which places have not yet been demanded. If a deviant or invidiously discriminatory case should ever occur, that would be time enough to tax the Village with failing to be fair and neutral. As of now, the above-quoted formulations of the Solicitor General are satisfied.

Elsewhere, however, omitting words like "similar" or "comparable," the Government appears to argue that Scarsdale must permit all symbols if it permits any; the brief speaks unqualifiedly about neutral rules "barring *all* unattended structures" (p. 24, emphasis added), about "other fixed, unattended symbols or structures" (pp. 24-25) and about "[a]n evenhanded distinction between unattended structures and live forms of expressive activity" (p. 26). While the Solicitor General's position is thus somewhat unclear, we note that there is no sound basis in law or good sense for demanding that Scarsdale and other municipalities choose between allowing all

9 The recurrent example of the swastika, used to make a point, has been over-simplified in our presentations. In addition to its most familiar, generally hated signification, it has served as a Jain and Buddhist symbol. *See* "swastika" in WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed., unabridged 1939).

structures or symbols and allowing none. Nothing in the First Amendment or this Court's precedents confronts local officials with any such grisly choice. "It would make little sense to say that a city has an all-or-nothing proposition—either ban all [symbols] or none at all." *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. at 532 n.10 (Brennan, J., concurring).

The power of municipalities to create limited or unlimited forums, coupled with the right to determine what objects shall stand on shared land and appear to express community sentiments, seems ample to repel the suggestion that parks as they have always been known must either be stripped of symbols or cluttered with everyone's sectarian or partisan or vulgar or otherwise contentious symbols. The difference between symbols to which no one seems to object and a symbol that sharply divides the community is reasonable, traditional and compatible with everyone's ample freedom to "speak" every imaginable view on religion, politics or anything else.

It bears emphasis that the principle of decision may be visible and neutral, as it is here, though the decision-maker does not anticipate and cover instances that have not yet arisen. As the Solicitor General acknowledges (Br. 20 n.11), Scarsdale's Trustees may evolve their principled position on a "case-by-case basis." There is no requirement that this lay agency write a constitutional treatise covering subjects never yet presented when it seeks to resolve in constitutionally permissible fashion an application for installation of a crèche in the park. This Court itself, with the supreme and final duty to expound the Constitution, often finds it prudent and wise to decide narrowly, on the specific facts, questions of the character here presented. *E.g., Widmar* v. *Vincent*, 454 U.S. at 277; *Lynch* v. *Donnelly*, 104 S. Ct. at 1361-62. To labor a truism only a little, the courts generally exercise their legal expertise in this fashion. A decision assigning liability to the purveyor of a mislabeled poison, *Thomas* v. *Winchester*, 6 N.Y. 397 (1852), was not less neutral and principled because the rule it adumbrated was not seen or made to embrace a dangerously defective automobile until 64 years later. *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).[10] Thus, the

10 *See* H. JONES, J. KERNOCHAN & A. MURPHY, LEGAL METHOD CASES AND TEXT MATERIALS 73 *et seq.* (1980).

fact that Scarsdale's Trustees have dealt reasonably and in a principled fashion with the only case or controversy of its kind ever to reach them is a full discharge of their obligation to obey the Constitution.

Because the only "case" to come before the Board is the crèche, only that unattended symbol has been forbidden. The result would seemingly be acceptable to respondents if the first rejected application had been for a hammer and sickle on May Day. But the principle is not different.[11] The decision is supported and supportable on neutral principles both actual and foreseeable. The Village's stance is in striking contrast with respondents' unprincipled view that the Free Speech Clause compels a place for the crèche while comparable things will presumably be excluded on grounds not even suggested to be consistent.

The Solicitor General argues that the Circuit, ordering that Scarsdale be enjoined, should be affirmed because the Board proceeded only on what the court held the mistaken ground of the Establishment Clause. This argument is unsound both factually and legally. In one of the many divergences among the briefs for affirmance, the Creche Committee observes (Br. 3) that the vote to deny permission reflected—as it did at least in part—the view that many found that the symbols standing on public land were not "neighborly" and were "offensive." The McCreary brief (p. 7) suggests that "no reasons" were given in 1982 and that the reported rationale was simply that the crèche in the park was "socially undesirable."[12] The fact is,

11 The Creche Committee (Br. 22) appears to find readily distinguishable "other vile and odious symbols which would sear the sensibilities and torture the soul of Scarsdale . . . ." Respondent Butler would object to a swastika in the park, even with a disclaimer sign, or to a sign with a hammer and sickle bearing the message "Religion is the opium of the people" (Butler Dep'n Tr. 67-69).

12 The McCreary respondents say over and over again, with ironical and misleading quotation marks, that the crèche was found to be "socially undesirable" as a structure left in the park and that this was the reason for the denial of permission. While it is not critical, the quoted phrase is repeated so insistently (McCreary Br. 7, 8, 11, 14, 16) that it must be marked for the perversion of the record that it is. The phrase is from a newspaper story, quoting respondent McCreary, who

of course, that the Board's minutes, like the Congressional Record, disclose a spectrum of reasons, including the Establishment Clause, for the Board's judgment (*see* Pet. App. 46a). Individual Trustees explained that allowing the crèche in the park, over widespread objections, was "unneighborly" (J.A. 135-36, 137, 143-44, 146, 163-64). The issue was treated repeatedly as calling for "human relations" advice rather than technically legal opinions (J.A. 38, 40). Not merely in terms of constitutional law, but as a principle of human relations, it was argued that the Board should not offend or affront objecting residents for whose benefit the Trustees govern the park (*id.*). These aspects of the opposition, eloquently stated by a group of Scarsdale's Christian clergymen (*infra*, p. 18), are among the facts stipulated in the record (J.A. 44).

But even assuming that the only stated ground had been the Establishment Clause, and assuming *arguendo* (contrary to Point II of our main brief) that this would not be in itself a sufficient basis for the Board's decision, the position of the United States as *amicus* would fail. Where the actions of the Village Board are sought to be overridden on grounds of constitutional law by a court's mandatory injunction, it is no argument for this extreme form of judicial control that the Village did not write a sufficient brief before being taken to court. Even the Congress and state legislatures, with their far greater legal resources, are not required to have formulated such justifications in advance of litigated tests. *Cf. Michael M.* v. *Sonoma County Superior Court*, 450 U.S. 464 (1981); *U.S. Railroad Retirement Board* v. *Fritz*, 449 U.S. 166 (1980); *United States* v. *O'Brien*, 391 U.S. 367 (1968). Decisions taken and rules made in far more sophisticated governmental bodies may be sustained though they are "the product of multiple and somewhat inconsistent purposes." *U.S. Railroad Retirement Board* v. *Fritz*, *supra*, at 181 (Stevens, J., concurring).

in turn was quoting a Trustee (Ullman) who had voted for the crèche in line with Mrs. McCreary's desires. He had used the quoted term to characterize the majority's stance, but then, as the cited story says but the McCreary respondents do not, had acknowledged that it was an "unfortunate phrase" that misdescribed the Board's position (Stip. Ex. 66, p. 38).

In short, with exceptions not material here,[13] the other branches and agencies of government are not treated by this Court as if the stated rationales for their actions were examination papers on abstruse questions of constitutional law to be graded pass or fail. Even on that kind of improbable footing, however, the decision taken by the defendant Trustees would be entitled to be sustained. What emerges from this record is a thoughtful, concerned, respectful and sensitive accommodation eloquently stated in nonlegal terms by a group of Scarsdale's Christian clergymen. The statement bears repetition (J. Ex. 157):

> In keeping with our respect for one another's beliefs and in keeping with our government's position to protect religious freedom without promoting or restricting particular religious views, we believe that it is inappropriate to use public property to make a religious statement. The freedom here involved is the right of each individual within the community to be assured that no certain religious symbol is presumed to represent him on the property which belongs to him in common with the fellow members of his community.
>
> This is not to say that religious symbols should not be seen in a community. Homes, media announcements and places of worship can be used by those wishing to call attention to their beliefs. In this way, the religious pluralism and freedom which we enjoy in this country are best served.

Those words sustain the Village's position in profound and neutral terms. This is in no remote sense a case of "discriminatory exclusion from a public forum." *Widmar*, 454 U.S. at 269-70. Until and unless Scarsdale, improbably, so much as approaches such a discrimination, its practice governing the few shared symbols in its shared parks, like the practice of municipalities everywhere, should not be disturbed.

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13 Where the questioned action is that of a supposedly expert administrative agency, the inadequacy of the expert judgment is not curable by new reasons the litigating lawyers may discover. *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

Thursday, December 6, 1984
The Detroit News

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City's Nazis seek Hitler display

By Don Tschirhart
News Staff Writer

Detroit area Nazis are seeking City Council permission to display a large photograph of Adolf Hitler next April outside the City-County Building where authorities now permit a Christmas creche.

In a letter to the council yesterday, the Nazis said if the Nativity scene is permitted, then they have equal right to mount the picture on Hitler's birthday, April 20. If they are turned down, they said, they will call on the

■ Communities challenge courts on creches — 1C.

American Civil Liberties Union (ACLU) to help them "exercise our rights."

"It could be the opening of a battle," said ACLU Director Howard Simon, when told about the Nazis' plan.

"By their stubbornness and insistence on allowing government property to be used for religious purposes, the authorities might have backed themselves into a legal trap."

The creche was erected on a site on the southwest corner of the building, along East Jefferson, that the Detroit-Wayne County Building Authority has designated as a "public forum," in an apparent effort to over-

Continued on Page 6B

BEST AVAILABLE COPY

Detroit petition

City's Nazis want Hitler display

Continued from Page 1H

come constitutional objections to religious displays on public land.

The authority, which operates the building, leases the site each Christmas season to the Central Business District Authority (CBDA) for $1 to display a Christmas nativity scene.

"When the building authority met to sell the Nativity scene to the CBDA in 1980," Simon said, "we told them they would have difficulty picking and choosing what would go on that site."

The City Council asked the city's Law Department for an opinion on the Nazis' request. "We should find out now what the legal ramifications are in light of other cities' problems with the Christmas scene," said Councilwoman Maryann Mahaffey.

In their letter, the Nazis said they sought to erect the Hitler photograph after learning recently that the City-County Building property could now be used to "further the interests of various political, social and religious organizations."

The letter was signed by Mark Heydrich, state organizer, in the name of Mike Kelverin of the S.S. Action Group, National Headquarters, Box 60, Dearborn Heights.

In another development, authority officials said they were expecting a request from a Jewish organization for permission to install a menorah, a nine-branch candelabra, to celebrate the Jewish Hanukkah holiday, which begins Dec. 19.